

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 26, 2010

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Missouri-Illinois Blood Region of the
American Red Cross
Case 14-CA-29989

This Section 8(a)(5) case was submitted for advice regarding whether the Union waived its right to bargain over changes to the health insurance plan by not requesting bargaining.

FACTS

The Missouri-Illinois Blood Region of the American Red Cross (the Employer) and Teamsters Local 682 (the Union) have been parties to collective-bargaining agreements since 1984; the 43-person unit consists of mobile unit assistants and pick up drivers. The most recent collective-bargaining agreement was effective from November 15, 2003 to November 15, 2008. The parties began bargaining for a successor agreement in October 2008, and the contract remains in effect while the parties bargain over a new contract. The parties had at least seven face-to-face sessions through Spring 2009. In Spring 2009, the Employer offered a proposed contract that the employees rejected. In August 2009, the Employer made a last, best and final offer, which the Employer provided to the Union in December 2009. The Union found this offer to be too vague and sent it back to the Employer. On February 1, 2010, the Union received the Employer's revised last, best and final offer. A vote on that offer was scheduled for February 2010.

Meanwhile, due to budgetary concerns, the Employer decided to make changes in the health insurance plans affecting both unit and non-unit employees at the Employer's various facilities, including those covered by the parties' collective-bargaining agreement. On April 2, 2009, the Employer notified all employees through its internal publication that it was considering making changes in the health insurance plans. The publication announced:

Upcoming Changes in Health Insurance Plans - in the months ahead, we will be looking for additional ways

to reduce benefit costs while maintaining market-competitive compensation and benefit programs for employees. Some examples of benefit plan cost-reduction strategies are close management of health insurance programs and plan design changes focused on cost containment and effective health-care management.¹

The Employer did not separately notify the Union of its intent to make changes in the health insurance plans or send a copy of the April 2 internal publication to the Union. However, the Union steward, who has been the unit's sole steward for seven years, and has attended all the bargaining sessions over renewal of the agreement, admits that he received a copy of the publication in his capacity as an employee. The Union president admits that in mid-April, the steward provided him a copy of this publication. The Union did not respond to the Employer's April 2 publication: it did not file a grievance, request bargaining, or mention the proposed future health care changes during bargaining.²

On about July 28, 2009, the Employer notified all employees through another internal publication of specific changes it intended to implement in its nationwide health insurance program. The publication was posted on the

¹ In the same publication, the Employer also notified employees that effective the first paycheck in May 2009, it was ceasing Employer contributions to the employees' 401(k) savings plan. The Region determined that in that very different situation, the Union's failure to request bargaining prior to implementation did not amount to a waiver where the Employer never notified the Union about the announced change; the Union did not learn about the change until two weeks before it was implemented; and the Employer presented it as a fait accompli. That issue was not submitted for Advice and Advice made no determination on that issue. Rather, the case was submitted to Advice on whether the suspension of the Employer's contributions should be analyzed as a contract modification under Section 8(d) or a unilateral change under Section 8(a)(5), and, if the latter, whether the Employer was privileged to act unilaterally under the Provena clear-and-unmistakable waiver standard. See Missouri-Illinois Blood Region of the American Red Cross, Case 14-CA-29751, Advice Memorandum dated November 20, 2009.

² The Union also did not file an unfair labor practice charge regarding the April 2 announcement and does not allege it as unlawful.

Employer's bulletin boards and distributed to employees. The publication contained a message from the Senior Vice President of Human Resources, entitled "Significant Changes Being Made to 2010 Benefits Advantage Plan." It discussed the Employer's escalating health insurance expenses, and announced three 2010 nationwide benefit changes.³ The Employer did not separately notify the Union of these proposed health insurance changes, or send the Union a copy of the publication to employees. The Union steward received the publication around July 28 as an employee, and provided the Union president with a copy in August 2009. The Union did not respond to the Employer's July 28, 2009 publication setting forth health insurance changes: it did not file a grievance, request bargaining, or mention the announced changes during the ongoing bargaining sessions for a new collective-bargaining agreement. On December 14, 2009, the Union filed an unfair labor charge over the changes. The changes became effective January 1, 2010.

ACTION

We conclude that the Union clearly and unmistakably waived its right to bargain over the matter.

When an employer gives a union advance notice of an intention to change a term or condition of employment, the union must make a timely request to bargain or waive that right.⁴ The fact that the employer did not directly notify the union of its intention to make a change is not sufficient to preserve the union's bargaining right where it received actual notice sufficiently in advance of implementation to request bargaining.⁵ Further, the

³ They were: (1) the standard and premier options would be consolidated; (2) there would be additional out-of-pocket costs to employees through increased deductibles and copays; and (3) a \$100 per month working spouse/partner surcharge would be introduced.

⁴ Medicenter, Mid-South Hospital, 221 NLRB 670, 679 (1975); American Buslines, Inc., 164 NLRB 1055, 1056 (1967).

⁵ WPIX, Inc., 299 NLRB 525, 525-526 (1990) (union waived its right to bargain because it failed to make a request after receiving "actual notice" that the employer intended to change employees' travel reimbursement rate, i.e., a union representative, by chance, noticed an interoffice memorandum to employees); American Diamond Tool, Inc., 301 NLRB 570, 570-571 (1992) (union waived its right to bargain about unilateral layoffs where it received actual notice of layoffs from employees during bargaining for initial

subsequent filing of a refusal-to-bargain charge is not sufficient to preserve the bargaining right.⁶

In the instant case, we conclude that the Union waived its right to bargain because the Union received actual notice about the Employer's proposed health insurance changes well in advance of implementation but never requested that the Employer bargain about them. Thus, the Union admits that it learned in April 2009 that the Employer was considering making changes to the health insurance plan. The Union made no request to bargain. The Union also admits that it learned in July 2009 of the specific changes that the Employer intended to implement in the employees' health insurance plan. The Union again made no request to bargain. The Employer did not implement changes until January 2010 - nine months after the Union first learned that the Employer was considering changes to the health insurance plan, and four months after the Union learned of the specific changes that the Employer intended to implement. Further, the Union had a good opportunity to request bargaining over these changes because the parties were already meeting over contract negotiations, which took place during the entire period between the Employer's initial notice and the implementation of the changes.⁷ Under these circumstances, we conclude that the Union clearly and unequivocally waived its right to bargain.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

contract but failed to request bargaining to rescind layoffs until almost four months later).

⁶ Medicenter, Mid-South Hospital, 221 NLRB at 679.

⁷ See American Diamond Tool, Inc., 306 NLRB at 570 (union had opportunity to object to layoffs and possibility of future layoffs at parties' bargaining sessions); Ventura County Star-Free Press, 279 NLRB 412, 420 (1986) (union acquiesced to change where it had four months notice of proposed changes but failed to request bargaining even though parties were negotiating successor agreement).